IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 13TH JULY 2006 / 22ND ASHADHA,1928

CRL.A.No. 157 of 2004()

AGAINST THE JUDGEMENT/ORDER IN CRLP.40/2004 Dated 14/01/2004
CC.885/2003 of ADDL.CHIEF JUDICIAL MAGISTRATE, ERNAKULAM

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APPELLANT:

M/S. BRISTO FOODS PVT.LTD.,
REGISTERED & ADMINISTRATIVE OFFICE,
CRYPTIMS HOUSE, PANAMPILLY NAGAR, KOCHI-36,
REP. BY ITS ACCOUNTS OFFICER & POWER OF ATTORNEY
HOLDER, MR. SURESH KUMAR N.S.

BY ADV. SRI.ALEXANDER PETER

RESPONDENTS:

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1. MR. HARIHARAN NAIR, PROPRIETOR,
M/S. SIVAKRISHNA AGENCIES, G.H.S. JUNCTION,
PALACE ROAD, ATTINGAL, THIRUVANANTHAPURAM.

2. STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.J.GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 13.7.2006, THE COURT ON 13/07/2006 DELIVERED THE
FOLLOWING:

C.R.

K.HEMA, J.

CRL.A.NO. 157 of 2004

Dated this the 13th day of July, 2006

JUDGMENT

Can a Magistrate acquit the accused under Section 256(1) of the Code of Criminal Procedure (the code, for short), before issuing process/summons to the accused ? This short question arises in this appeal filed by the complainant, challenging the order of acquittal passed under Section 256(1) of the Code.

2. The appellant filed a complaint before a Magistrate's Court, alleging offence under Section 138 of the Negotiable Instruments Act. The first respondent is the accused in that case. The case was taken on file by learned Magistrate and summons was issued to the accused by registered post. The case was then posted to another day. But, on that day, complainant was absent. His counsel was also absent. There was no representation for the complainant. Hence the accused was acquitted under Section 256(1) of the Code of Criminal Procedure. Is such an order sustainable?

3. Learned counsel appearing for complainant-appellant submitted that by an inadvertent mistake, a wrong date of posting was noted by both complainant and his counsel and hence, both of them were absent on the crucial day. Their absence was not willful. He also submitted that the presence of the complainant was not at all required on that day, since the case was posted only for appearance of accused. But, even before appearance of the accused, the accused was acquitted. This is illegal, it is argued.

4. I shall first go through section 256 of the code and find out whether on the facts of this case and in the light of the provision contained in Section 256 of the code, the impugned order of acquittal is legal or not. Section 256 reads as follows:

> "S.256. **Non-appearance or death of complainant.-** (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:
>
> Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

> (2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

A reading of Section 256(1) of the code shows that if summons has been issued on complaint, and the complainant does not appear on the day appointed for appearance of the accused, the Magistrate shall acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. It is clear from section 256 of the code that non-appearance of complainant would become fatal even on the date appointed for first appearance of the accused. Therefore, the argument that an accused shall not, **under any circumstance**, be acquitted on the day posted for his appearance, since presence of the complainant on such day is not at all required etc., is not acceptable.

5. The expression used in Section 256(1) is "shall" acquit and not "may". This apparently indicates the mandatory nature of the provision, going by the expression used in the section. It has also to be borne in mind that the consequence of a mere non-appearance of complainant and his counsel would be very fatal resulting in the acquittal of the accused, that too, at a very early stage of the proceedings itself. In my view, the above facts must

alertedly forewarn the court and put it on guard to make sure that all the requirements under the said section are thoroughly satisfied, before acquitting an accused under section 256(1).

6. In this back ground, I shall consider whether the acquittal of the accused on the relevant day is legally sustainable in the light of section 256(1) of the code. Admittedly, summons has been issued by the court to the accused, on a complaint filed by the appellant. It is also admitted that neither the complainant nor the counsel was present in the court on the day to which the case was adjourned, after issuing summons to the accused. So, on a first blush, it may appear that the impugned order of acquittal was passed on one of the days specified in section 256(1) of the code ie., "the day appointed for the appearance of the accused". But, on a close analysis of the relevant provisions of the code, I find that the situation is otherwise

7. A reading of section 204 of the code, along with section 256(1) of the code would be essential to substantiate this position. Section 204 of the code, excluding irrelevant details reads as follows:

> **"S.204. Issue of process.—**(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
>
> (*a*) a summons case, he shall issue his summons for the attendance of the accused, or
>
> (*b*) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
>
> (2)xxxx.
>
> (3) xxxx
>
> (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
>
> (5) xxx"

8. Sub-section (1) of section 204 of the code shows that the court can issue summons to the accused for his attendance in court. As per sub-section (4) of section 204, even in cases where such summons is issued by court, no process shall be issued, until the required fees are paid by the complainant, within a reasonable time. Therefore, in such cases, the court is not actually appointing the day for appearance of the accused in court. By merely issuing summons under section 204(1) of the code, the court does not appoint the day for appearance of the accused in court.

9. The court fixes the day for his appearance only when it issues process in Form No. 1 of the Second Schedule of the code specifying therein, the date for his appearance in court. Therefore, "the day appointed for the appearance of the accused" referred to in section 256(1) is not the day to which the court adjourns the case, after issuance of summons to the accused under section 204(1) of the code. The day appointed for the appearance of the accused is the day stated in the process/summons issued by the court in Form no.1 of the Second Schedule of the code or any day to which the case is subsequently adjourned, specifically for appearance of the accused. Therefore, the Magistrate "shall" acquit the accused for non-appearance of complainant and his counsel, only on such day, unless he thinks it proper to adjourn the case for hearing to some other day.

10. In some cases, depending upon the facts of each case, complainant's appearance would become absolutely necessary on the day appointed for appearance of the accused in court. Because, under certain circumstances, the court may find it unjust and improper to adjourn the case for hearing to some other day, in the absence of complainant since it may prejudicially affect the interest

of the person who appears in court in obedience of summons. For example, the accused may not be the person intended by the complainant, but summons would have been wrongly issued to accused, because of a mistaken description in the cause title. The accused may bring the relevant facts to the notice of the court, while making his defence under section 251 of the code on his first appearance in court. He may also satisfy the court with sufficient materials that he is not the person involved in the case or sought to be brought before court.

11. In such cases, if the complainant and his counsel are absent on the day appointed for appearance of accused, the Magistrate need not adjourn the case to some other day for hearing, on being aware of the actual position. The court shall acquit the accused for non appearance of the complainant, if the court finds it not proper to adjourn the case for hearing. The court will be justified in acquitting the accused under section 256(1) of the code in such circumstances, because any further proceedings will work out injustice to the accused. It is only just and proper that in such instances, the accused is not dragged to the court again at the instance of a non-vigilant complainant.

12. But, if the court is not fully satisfied of what the accused has stated on his appearance in court and the court finds that the complainant should also be heard before acquitting accused, the court has to adjourn the hearing of the case and not acquit the accused under section 256(1) of the Code even if the complainant and his counsel are absent. The accused can be acquitted under section 256(1) only if the court does not think it proper to adjourn the hearing of the case to some other day.

13. I have cited just one example here. There can be many more compelling instances where the court may face such situations and find it improper to grant an adjournment. So, in such appropriate cases where the court thinks it not proper to adjourn the case for hearing, the court "shall" acquit the accused under section 256(1) of the code, for non-appearance of complainant and his counsel, subject to what is laid down in the said section.

14. Even other wise, if on issuance of summons to the accused, the court adjourns the case to some other day and the complainant does not pay the requisite process fees within a reasonable time, the option left to the court is to dismiss the complaint under section 204(4) and not to acquit the accused

under section 256(1) of the code. If the court is satisfied that a reasonable time is granted to make such payment, and the complainant is still not paying the same, the court may dismiss the complaint under section 204(4) of the code.

15. When there is a specific provision in the code to meet such situation, the court has to proceed under the said provision and it shall not invoke section 256(1) of the code to acquit the accused. It has also to be borne in mind that without issuance of process/summons to the accused, the court will not be appointing a day for his appearance in court and hence no order of acquittal can be passed under Section 256(1) of the code.

16. Thus, the court shall not acquit an accused under Section 256(1) code, before issuance of process/summons to accused in Form no. 1 of the Second Schedule of the code, without appointing a day for his appearance in court. Any order of acquittal passed under section 256(1) of the code, before issuance of process/summons to the accused will be clearly illegal and without jurisdiction. But, the learned Magistrate has acquitted the accused in this case, even before issuing process/summons to accused without

granting a reasonable time to the complainant for paying the requisite fees. Section 204 provides for granting a reasonable time for payment of the requisite fees. Therefore, the impugned order is not legal or proper.

17. The order under challenge is therefore set aside. Learned Magistrate is directed to take the case on file and dispose of the same in accordance with law. The appellant shall appear before the court below on 30.10. 2006.

The appeal is allowed.

K. HEMA, JUDGE

vgs.